IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1943.

No. .....

ALBERT W. ISELIN AND LOUISE G. ISELIN,
Petitioners,

versus

ARNAUD LACOSTE,
Respondent.

BRIEF ON BEHALF OF ALBERT W. ISELIN AND LOUISE G. ISELIN, PETITIONERS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The judgment rendered by the District Court of the United States for the Western Division of the Southern District of Mississippi, will be found at page 133 of the record. The Judgment of the United States Circuit Court of Appeals for the Fifth Circuit affirming this judgment will be found at page 155 of the record. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found beginning at page 151 of the record.

II.

JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U. S. C. 347).

III.

STATEMENT OF THE CASE.

The material facts and the questions involved herein will be found at page 2 *et seq.* of the foregoing petition.

IV.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred in refusing to apply the rules, decisions and procedure laid down by the Supreme Court of the United States, and other Circuit Courts of Appeals in those certain causes cited in detail under the argument (VI).

(1) That the allegations in the Petition for Declaratory Relief should be taken as true; and that, therefore, said Court was in error in affirming the judgment of the lower court dismissing said cause; that in so holding the Court refused to apply the rules and law in the decision of this Honorable Court.

(2) That a "metes and bounds" description governs, and the Court was wholly in error in holding that the

Petitioners had previously conveyed the land, the subject matter of this controversy to the Mengel Company; that in so holding the Court refused to apply the rules and law in the decision of this Honorable Court.

V.

SUMMARY OF ARGUMENT.

A. The Petitioners (Appellants in the lower court) were entitled to a trial on the merits in the lower court, and the Court was bound to take as true all of the allegations in said Petition for Declaratory Relief.

B. That a "metes and bounds" description governs and the Court was wholly in error in holding that the Petitioners had previously conveyed the land, the subject matter of this controversy, to the Mengel Company.

VI.

ARGUMENT.

A. As to the first proposition involved, the law is well settled that in passing on a Motion to Dismiss, the same procedure is applicable as in passing on a Demurrer; that the Court must take as true all of the allegations in the Petition for Declaratory Relief; in other words, both sides to the controversy rest on the legal and factual sufficiency of the Petition for Declaratory Relief; and the Court must look solely and exclusively to the legal and factual sufficiency of the Petition for Declaratory Relief.

Appellants propose to show on a trial on the Merits that the lands in question comprised an island originally on the west side of the thalweg or main bed of the Mississippi River; that by a change in the course or channel of the River it was thrown on the east side of the thalweg or main channel of the Mississippi River, that all accretions that formed thereto are part and parcel of the island whether it extended to the mainland on the Mississippi shore or not.

This Court will observe from Exhibit "A" filed with the Petition for Declaratory Relief that at the time of the United States Government Survey in the period 1829 to 1830 the fractional sections involved in this controversy were a part of the Louisiana side of the Mississippi River and it will be noted from the exhibits with the Petition for Declaratory Relief that the fractional sections involved in this case were at the time of the first Government survey located wholly within the Parish of Madison, State of Louisiana, and that they consisted of approximately the following acreage: Fractional Section 17, containing 112.28 acres; Fractional Section 19, containing 164.24 acres; Fractional Section 20, containing 168.12 acres; Fractional Section 21, containing 165.91 acres; Fractional Section 22, containing 176.34 acres; Fractional Section 23, containing 172.42 acres; all in Township 14 North, Range 14 East, that at the present time there is the same acreage but there is total accretions to the west of said fractional sections of 1000 acres more or less.

Their contention is that what is now known as Diamond Point was originally an island formation in the Mississippi

River on Sargent's Point, Louisiana side. A slough separated Louisiana mainland and the bar or island, and avulsions tearing away the Louisiana bank of the river upstream above the Island and that a freshet or high water forcing the river water through the slough between the Island and the Louisiana mainland made such an opening there that when the water receded the main channel had shifted around from the east side to the west side of the Island. Between the Island and the Louisiana mainland the river current during freshets and floods caused avulsion after avulsion on Sargent's Point, Louisiana, until the river had deserted its original bed to a distance of 4 to 5 miles westward, and the Island then built by accretions to the westward following the rapidly changing river. And all of the sections of land owned in fee by these Appellants, caved into the river very perceptibly and dangerously to any boats passing too near, and most of the avulsions tearing away or caving were not only perceptible, but were so audible as to be heard 2 or 3 miles away, and all the sections owned in fee by these Appellants, which were washed away, have now rebuilt and reappeared first as an island on the same identical area and subject to identification by accurate survey. The accretions were to the island, and not to the Mississippi mainland and caused the island to become an integral part of the Mississippi mainland by reason of the accretions building up from the island towards the mainland.

Therefore, taking the allegations of said Petition for Declaratory Relief as true, and the court must so accept them and was required to assume Petitioners' ability to prove them, it is manifest that they stated a good cause

of action and one that entitled the Petitioners to have a trial on the merits in the lower court, and both Court's refusal to so Rule was in conflict with the decisions of this Honorable Court germane thereto.

This Honorable Court in the following cases set a rule that should have governed the instant case, and became binding upon all Federal Courts.

This Honorable Court in the case of *Polk Co. v. Glover,* 305 U. S. 5, 59 S. Ct. 15, enunciated a rule equally applicable to the instant court, saying:

> "We think the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issue (as to which we intimate no opinion) in advance of that opportunity. The allegations of the bill as to trade conditions and practices, and as to the effect of the required embossing of cans, raise particular questions which can hardly be said to lie within the range of judicial notice."

And again in the case of *Ickes v. Fox,* 300 U. S. 82, 57 S. Ct. 412, this Court said:

> "The motion to dismiss concedes the truth of these allegations; but even if they were denied, we should still be obliged to indulge the presumption in favor of the jurisdiction of the trial court, that respondents might be able to prove them."

Citing also: *United States v. Lee,* 106 U. S. 196, 218, 219, 27 L. ed. 171, 181, 1 S. Ct. 240; cf. *Tindal v. Wesley,* 167 U. S. 204, 213 *et seq.,* 42 L. ed. 137, 142, 17 S. Ct. 770.

And this Court, speaking through Mr. Justice Miller had this to say:

> "In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration."

And the various Circuit Courts of Appeals have held as follows:

A motion to dismiss the complaint in an action for a declaratory judgment is the equivalent of a "demurrer" and the court must accept as true all the allegations of the complaint and on that basis determine whether the complaint presents a cause of action under this chapter. *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.,* C. C. A. Ill. 1941, 123 F. 2d 518.

In action for declaratory judgment, allegation in plaintiff's pleading must be taken as true on motion to dismiss. *Consolidation Coal Co. v. Martin,* C. C. A. Ky. 1940, 113 F. 2d 813.

A motion to dismiss suit in equity under this section admited all material facts well pleaded. *Western Casualty & Surety Co. v. Beverforden,* C. C. A. Mo. 1938, 93 F. 2d 166, reversing 17 F. Supp. 928.

As this Honorable Court has often made the declaration that what they demand in a brief in support of a Petition for a Writ of *Certiorari* is brevity we have purposely refrained from a long exposition of clients' claim. This Honorable Court will notice that in the Petition for Rehearing, pages 7 to 18 inclusive, we present rather fully the basis of Petitioners' claim to the land in question.

Petitioners' claim is that the island which originally formed off Sargent's Point by a process known as avulsion and was subsequently transferred by a change in the main channel of the river and that after its transfer and reappearance on the East side of the river, and built up by accretions to the Mississippi shore is the same land that is the subject matter of this controversy.

It being a requisite in passing on the question of whether or not there was an avulsion, that the claim be substantiated by evidence, we fail to see how the lower court could come to the conclusion that no avulsion had occurred, merely because the Respondent had asserted that it had taken place over a period of years. The question of whether or not the land was formed by an avulsion is an evidentiary fact only determinable on a trial on the merits in the District Court, and not in the lower courts.

It is generally agreed that some 2500 or 3000 acres are in litigation and by no stretch of the imagination could a situation occur where overnight this amount of acreage was suddenly catapulted from the Louisiana to the Mississippi side. This would be an impossibility. The only recorded instance in the past history of the Mississippi valley where such a phenomenon occurred was in the year 1811 when an earthquake occurred at New Madrid, Missouri, and overnight changed the course of the Mississippi River, as well as formed numerous islands and lakes in the contiguous territory. This was brought about by a rare, physical phenomenon and not by any regular process of either accretions or avulsions, as all caving, tearing away of the river banks on Sargent's Point, now Diamond Point, was caused by avulsions. It is not charged by these Appellants that an earthquake formed this island and it is denied that it was formed by a slow physical, imperceptible change in the normal flow or course of the Mississippi, rather it would be substantiated by proof, on a trial on its merits that the island was formed by a process known as avulsion, and over a period of time.

We urged on the District Court and United States Circuit Court of Appeals (Fifth Circuit), in addition the decisions of this Honorable Court the following decisions of District and Circuit Courts which have applicability to a motion to dismiss a Petition for Declaratory Relief and which in the case of those appealed have not been reached finally in the various Circuit Courts of Appeals and the United States Supreme Court but which correctly enunciate the views of this Honorable Court:

On a Motion to Dismiss the Court must accept as true allegations of the Complaint. *Abel vs. Munro,* D. C. N. Y. 1939, 27 F. Supp. 346.

The Court in ruling on a Motion to Dismiss a Petition for Declaratory Judgment must accept all such allegations in the Petition as true, and determine whether the Petition or Declaration presented a cause of action based upon the federal statute. *Northern Motor Corpn. vs. Divco-Twin Truck Co.,* D. C. Mich. 1939, 28 F. Supp. 308.

Evidence which parties expect to introduce at the trial on the merits cannot be considered on a Motion to Dismiss the complaint, but the Petition must be judged by its allegations. *Bagby vs. Cleveland Wrecking Co.,* D. C. Ky. 1939, F. Supp. 271.

On a Motion to Dismiss for failure to state a claim disclosing a cause of action, the Court was required to assume Appellants' ability to prove facts averred and hence to accept averments as facts. *Shaw's vs. Wilson Jones Co.,* D. C. Pa. 1939, 26 F. Supp. 713.

A Motion to Dismiss complaint on the ground that it fails to state a claim on which relief can be granted, is limited to the pleading. *Sherover vs. John Wanamaker,* D. C. N. Y. 1939, 29 F. Supp. 650.

Allegations of complaint are admitted by Motion to Dismiss. *Midwest Haulers vs. Brady,* C. C. A. Ohio, 1942, 128 F. 2d 496.

On Motion to Dismiss, it must be assumed that a complaint states the truth. *Mandley vs. Backer,* 1941, 121 F. 2d 875, 73 App. D. C. 412.

On Motion to Dismiss complaint for failure to state a claim upon which relief can be granted, allegations of complaint will be assumed to be true. *Niagara Motors Corporation vs. McGowan,* D. C. N. Y. 1942, 45 F. Supp. 796.

Allegations of complaint were admitted for purposes of Appellee's motion to dismiss complaint. *Hunt vs. Cromboch,* D. C. Pa. 1941, 44 F. Supp. 796.

For purpose of Motion to Dismiss, allegations of complaint would be taken as true. *Ferguson vs. Reed,* D. C. Pa. 1942, 44 F. Supp. 387.

On Motion to Dismiss, the allegations of the complaint were assumed to be true. *Stuff vs. La Budde Feed & Grain Co.,* D. C. Wis. 1941, 42 F. Supp. 493.

On Motions to Dismiss, every presumption and inference from pleadings must be resolved in favor of pleader. *Geismar vs. Bond & Goodwin,* D. C. N. Y. 1941, 39 F. Supp. 536.

On Motion to Dismiss, allegations of complaint must be taken as true. *Crockett vs. Wiedemann,* D. C. Cal. 1941, 39 F. Supp. 266.

B. The second proposition or question, as to whether or not these petitioners had previously conveyed to The Mengel Company the lands involved in this proceeding, is

really the cardinal point in this controversy, and we believe that this too, was the feeling of both of the lower courts, the U. S. District Court for the Western Division of the Southern District of Mississippi, as well as the U. S. Circuit Court of Appeals for the Fifth Circuit, for the former in its order or judgment (R. P. 133 *et seq.*) held "Also, I am of the opinion that by his deed of conveyance in the Mengel deed he parted with whatever title he had and his reservation to accretions 'was not sufficient to entitle him to recover'. Likewise, the latter Court in its opinion and decree (R. P. 151 *et seq.*) held: this identical property was conveyed by these appellants to a third party (the Mengel Company) for a fully paid cash consideration prior to the institution of this action. The deed to appellants was executed in 1926, at which time, under the allegations of the petition, the land in controversy was in Warren County, Mississippi. It thus appears that these appellants never acquired any interest in the land to which they now seek confirmation of title, and if they did, they disposed of their interest prior to the institution of this action."

This Honorable Court will notice from the U. S. Government Contour Map attached to the deed from Petitioners to The Mengel Company and made a part thereof, and which is sent up with other original exhibits, that the lands herein involved were purposely excluded from that deed by a mete and bound description.

This Honorable Court on this point has held as follows:

Where, in a deed, there is a specific description, by metes and bounds, of the lands conveyed, other words therein

intended to describe generally the same land, do not vary or enlarge the specific description. *Prentice v. Northern P. R. Co.*, 154 U. S. 163, 14 Sup. Ct. Rep. 997.

Metes and bounds in the description of premises control distances and quantities when there is any inconsistency between them. *Morrow v. Whitney*, 95 U. S. 551, *Horne v. Smith*, 159 U. S. 40, 15 Sup. Ct. Rep. 988.

Quantity in description must yield to definite description by metes and bounds or by name and number; quantity may aid but cannot control such description. *Springer Land Asso. v. Ford*, 168 U. S. 513, 18 Sup. Ct. Rep. 170.

And Petitioners show that the decisions and judgments of the United States District Court and the Circuit Court of Appeals (Fifth Circuit) on this proposition and question is in direct conflict with the decisions of the Supreme Court of the United States and the several Circuit Courts and District Courts.

And Petitioners further show that practically all of the above authorities on these two questions and propositions were cited to the District Court and Circuit Court of Appeals, Fifth Circuit, and notwithstanding this the said Courts rendered judgments and decisions in direct conflict therewith.

CONCLUSION.

Petitioners therefore submit that a Writ of *Certiorari* should be granted to review the judgment of the United

States Circuit Court of Appeals for the Fifth Circuit, in order that that judgment may be brought into conformity with the controlling decisions of the Supreme Court of the United States.

Respectfully submitted,

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Attorney for Petitioners